MALAYSIAN REPORTS

NG KOK LIAN & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Salleh Abas C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah F.JJ.) July 4 & August 3, 1983] [Kuala Lumpur – Federal Court Criminal Reference No. 3 of 1983]

Evidence – Accomplice – Whether receiver of gratification is prima facie an accomplice – Court must make finding on evidence – Prevention of Corruption Act, 1961, s. 18.

Criminal Law and Procedure – Charge of giving illegal gratification – Whether receiver is prima facie an accomplice – No automatic rule – Prevention of Corruption Act, 1961, s. 18.

Bribery and Corruption – Corruption – Gratification – Whether receiver is prima facie an accomplice – Prevention of Corruption Act, 1961, s. 18.

In this case the appellants had been convicted for the offence of giving a bribe to a public officer. Their appeal to the High Court was dismissed. Leave was given to refer the following questions for the determination of the Federal Court:–

(1) Whether a witness alleging that he had been given gratification by the accused is, *prima facie*, an accomplice?

(2) If the answer to question (1) above is in the positive, whether there is a duty on the part of the trial court to determine whether having regard to the circumstances of the case, such a witness is or is not an accomplice?

Held: the answer to question No. (1) is in the negative and there was therefore no need to deal with question (2). Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his *actus reus*.

Cases referred to:

(1) *Baptist* v. *Public Prosecutor* [1962] M.L.J. 25.
(2) *Public Prosecutor* v. *Haji Ismail & Anor.* [1940] M.L.J. 76.
(3) *Daimon bin Banda* v. *Public Prosecutor* [1951] M.L.J. 11, [1953] M.L.J. 23.
(4) *Tay Choon Nam & 2 Ors.* v. *Rex* [1949] M.L.J. 157.
(5) *Lian Teck Chew* v. *Regina* [1955] M.L.J. 28.
(6) *Goh Leng Sai* v. *Regina* [1959] M.L.J. 121.

FEDERAL COURT.

Raja Abdul Aziz Addruse (*C.F. Leow* and *M. Chang* with him) for the appellants.

Abdul Khalid bin Abd. Manaff (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (Judgment of the Court read by Syed Agil Barakbah F.J.): In this Reference the appellants were tried and convicted by the President Sessions Court, Kuala Lumpur for an offence under section 3(b)(ii) of the Prevention of Corruption Act, 1961 for giving a $400.00 bribe in Singapore currency to a public officer and as a result were sentenced as follows:

(a) first appellant to three months' imprisonment and a fine of $4,000.00 in default of which to a further two months' imprisonment; and

(b) second appellant to one month's imprisonment and a fine of $1,000.00 in default of which to a further one month's imprisonment.

Both the appellants appealed against their conviction and sentence to the High Court and Mohamed Dzaiddin J. who heard the appeal dismissed it. The appellants then applied for leave under section 66(1) of the Courts of Judicature Act to refer for our determination a number of questions of law which they thought were of public interest. After hearing arguments of both sides, we gave leave to raise only the following questions:

(1) Whether a witness alleging that he had been given gratification by the accused is, *prima facie*, an accomplice?

(2) If the answer to question (1) above is in the positive, whether there is a duty on the part of the trial court to determine whether having regard to the circumstances of the case, such a witness is or is not an accomplice?

At the conclusion of the hearing of the reference on these two questions, we gave our decision orally in that the answer to question (1) is in the negative and that therefore the answer to question (2) does not arise. Here are our reasons for so holding.

The appellants were convicted on the evidence of PW8, the public officer concerned, to whom the appellants were alleged to have given the bribe. It is the submission of the appellants that PW8 was an accomplice and that as there was neither

corroboration of his evidence nor a warning by the learned President, Sessions Court, to himself of the danger of convicting the appellants without corroboration, the appellants should, therefore, be entitled to an acquittal.

When the case was before the learned President, the issue as to whether PW8 was an accomplice or not depended upon two diametrically conflicting versions of the case. The appellants contended that PW8 was an accomplice because according to their version of the event, they were the victims of PW8's fabrication. They maintained that PW8 asked for a bribe and that they refused to give it and that after having been told that they had close connections with certain influential people in Johore, PW8 became frightened and that in order to save himself he invented a fabricated version to the effect that the appellants had bribed him. It is based on this allegation that counsel for the appellants submitted in court below that "PW8 was the offender and culprit". (p.104 of record). The prosecution on the other hand submitted that its version of the event, if believed, would not make PW8 an accomplice. The learned President rejected the appellants' version and accepted the prosecution's story, which is well set out in the judgment of the learned President and that of Mohamed Dzaiddin J. The gist of the story is that the bribe was given to PW8 unsolicited and unasked for and in fact it took him by surprise. It was literally forced upon him because when he wanted to return it to the appellants they refused to take it back and quickly left PW8's office. The incident occurred just before lunch time and PW8 could not see his superior officer (PW1) until almost three hours later, as the latter was busy with some other visitors and on his advice PW8 kept the money overnight until he finally reported the matter to the BSN the following day and handed it to the Agency. This was confirmed by his superior officer.

On the facts as found by the learned President, Mohamed Dzaiddin J. held that PW8 was not an accomplice quoting *Baptist* v. *Public Prosecutor*.[1] as an authority for so holding.

Counsel for the appellants now submitted to us that it was wrong for the learned Judge to rely on *Baptist's* case because a witness who is given a bribe should not be given the same credit as one who gives it; the latter having the presumption under section 18 of the Act to protect his credibility. He therefore submitted that the mere receiving of a bribe, irrespective of the circumstances in which it was given and received, makes the receiver *prima facie* an accomplice. The relevant judgment of Syed Sheh Barakbah J. (as he then was) in *Baptist's* case which was relied upon by Mohamed Dzaiddin J. and attacked by the learned counsel as being erroneous is as follows:

> "In both these cases, the person who received the money was arrested, not the person who paid the money. In the present case the person who paid the money was arrested and there appears to be no decided cases as to whether the receiver is an accomplice or not. In my opinion it makes no difference whether the witness is the receiver or the payer and I therefore do not consider PW1 as an accomplice whose evidence requires corroboration."

It is his submission, therefore, that as the presumption against unworthiness of credit under section 18 of the Act only applies to a giver of a bribe, the receiver or the witness to whom it is given being excluded by the section becomes *prima facie* an accomplice by a mere proof that he received it, or that it was given to him.

With respect we cannot agree to this submission.

Section 18 of the Prevention of Corruption Act 1961 is as follows:

> "18. Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body."

Historically this provision is the re-enactment of section 13(3) of Prevention of Corruption Ordinance, 1950, which was wholly replaced by the 1961 Act. This provision was introduced in the 1950 Ordinance for the first time. Prior to this Ordinance, neither the F.M.S. Prevention of Corruption Enactment (see F.M.S. Enactment No. 23/1938) nor those of the unfederated Malay States nor the Ordinance of the Straits Settlements (S.S. Ordinance No. 41/1937) contained such provision. In Singapore the provision was introduced for the first time as section 24 in the Prevention of Corruption Ordinance No. 39/1960, the revised version of which is the Act No. 27/72 (Cap.104). Until the passing of the 1960 Ordinance, the law on this subject was the S.S. Ordinance No. 41 of 1937, which was the same as the F.M.S. Enactment No. 23 of 1938. The corresponding legislation of the United Kingdom, i.e. Prevention of Corruption Acts, 1906, 1916 and Public Bodies Corrupt Practices Act, 1889 upon which

the Malaysian and Singapore legislation was based contain no such provision. It is, therefore, clear that this provision is a Malayan innovation introduced for the first time in Malaya in 1950 and accepted by Singapore in 1960.

What was then the reason for introducing this provision for the first time? According to the then Attorney-General, Mr. Stafford Foster Sutton, whose opinion was printed as objects and reasons for the introduction of the bill to enact the 1950 Ordinance, a giver of a bribe is in strict law an accomplice and if corroboration of his evidence is required in any case it would lead to unjust acquittal of the accused. Hence it is considered that the presumption against an accomplice's evidence should have no application to "such offence as the giving of bribes". (*FM Gazette Supplement* No. 185/1950 dated January 24, 1950).

The concern expressed by the Attorney-General must have been due to the then prevailing practice of the courts in invariably acquitting the accused on a mere issue raised by the defence that the giver of the bribe was an accomplice without even bothering to examine the giver's evidence. Such practice is clearly reflected in *Public Prosecutor* v. *Haji Ismail & Anor.*[2] In that case the Kuala Langat magistrate acquitted the accused of a charge under section 161 of the Penal Code upon a submission of their counsel to the effect that prosecution witnesses were accomplices and that being the case the presumption under section 114(b) of the Evidence Ordinance as to the unworthiness of belief of the testimony of an accomplice should be automatically applied. Cussen J. who heard the appeal by the Public Prosecutor castigated this approach in the following words, at page 79:

"There is no question of the mechanical application of any general rule of presumption. When it is a question of this particular presumption, the credibility of the witness who is in the position of an accomplice must be individually judged just as any other witness, the same considerations being applied, with the added one that he is an accomplice. The Court must consider who and what he is, his demeanour, bearing, the manner and quality and substance of his evidence in itself and in relation to all the circumstances of the case, The nature, quality and degree of his complicity must be examined. Then finally the Court must form its opinion whether he is to be given credit and his evidence accepted without corroboration or not.

He is a competent witness and as such is entitled to have his credibility judged in itself; his evidence must be weighed and examined and not put aside unjudged and unconsidered because he is an accomplice".

It would, therefore, be seen that section 13(3) of the 1950 Ordinance was introduced purely to rectify the judicial tendency of acquitting the accused on the slightest pretext that the prosecution witness was an accomplice and, therefore, unworthy of credit without even bothering to examine the evidence properly to determine whether the witness was in fact an accomplice.

The effect of this provision came to be the main issue in *Daimon bin Banda* v. *Public Prosecutor.*[3] In that case a police detective was convicted of receiving $100/- bribe upon the evidence of witnesses who were clearly and undisputedly accomplices and not independently corroborated. In the appeal before Taylor J. the prosecution sought to support the conviction by relying upon the provision of section 13(3) of the 1950 Ordinance contending that by virtue of the provision the rule as to accomplice's evidence in the trial of corruption cases did not apply at all. Taylor J. rejected the prosecution's submission and allowed the detective's appeal. In his judgment the learned Judge said the following:

... "That provision, however, does not abrogate the rule. It introduces only a limited modification. It does not apply to accomplices generally. The word 'accomplice' does not appear in the subsection. The effect of the new provision is that in corruption cases the mere fact that a man has made an improper payment is not by itself enough to brand the man as a person whose evidence, if uncorroborated, is probably untrustworthy. If the man has taken part in the transaction in such a way as to show that, apart from the bare payment, he was an accomplice, then the ordinary rule applies.

The subsection is in the nature of an exception to a standing rule of evidence and, as an exception, it must be construed strictly. It must not be extended."

By a certificate this issue came before the Court of Appeal. (See [1953] M.L.J. 23). By then Mr. Foster-Sutton who was Attorney-General when the 1950 Ordinance was passed became the Chief Justice. In delivering the judgment of the Court of Appeal, the learned Chief Justice expressed his agreement with Taylor J. and also reiterated his earlier view expressed when he was the Attorney-General. He said, at p.24:

"In our view, the legislation in question does not go as far as contended by the Public Prosecutor. Before its enactment the mere fact that a person had made an improper payment to a public officer would have necessitated his being regarded as an accomplice to the offence in criminal proceedings against such officer under section 165 of the Penal Code, even although he had taken no part in corrupting the officer into receiving any bribe.

We agree with Taylor, J., that the effect of the new provision is that, in corruption cases, a person is no longer to be presumed unworthy of credit merely by reason of the fact that he has made, or caused to have made, an improper payment.

If, however, he has taken some more infamous part in the transaction, for example actively corrupted the public officer into accepting the bribe, the new provision does not cover his testimony.'

We have traced the history of the provision and analysed its effect upon the existing law as to the accomplice's evidence at length. This is done for no other purpose than to show that the provision does not change the law as to accomplice's evidence at all. The limited modification or an exception referred to by Taylor J. is nothing more than a legislative design to obviate the practical difficulties which the prosecution used to encounter prior to the passing of the 1950 Ordinance because of the ever increasing readiness of the courts to hold a giver of a bribe to be an accomplice irrespective of the circumstances in which it was given. This provision, therefore, serves as a reminder to the courts of their duty to examine the evidence of the witness who gives the bribe closely before arriving at a decision that he is an accomplice, and not to automatically apply the rule as to an accomplice's evidence as was done by the Kuala Langat magistrate in *Public Prosecutor* v. *Haji Ismail & Anor. (supra).*

As a receiver of a bribe is not within the provision, surely his credibility should be judged in the same way as that of a giver prior to the enactment of the provision in 1950. In any case even after the provision was passed, it being only a limited modification, and the rule as to accomplice's evidence not being abolished, we cannot see any reason why a witness to whom a bribe is given should be less believed than his counter-part, the giver. It is for this reason, we think, that Syed Sheh Barakbah J. thought that it made no difference whether the witness is the receiver or the payer; the central question being always whether he is an accomplice, irrespective of the part he played in the transaction. The court must therefore approach his evidence in the same way and not come to an automatic conclusion as in *Haji Ismail's* case *(supra)* that he is an accomplice just because counsel said so. There can be no automatic application of the rule as the accomplice's evidence to any witness nor could a witness be *prima facie* an accomplice without first examining his evidence to find out whether he is an accomplice or not; least of all to be held an accomplice just because money was given to him or because he received it.

To be an accomplice the witness who received the bribe must be the one who was abetting the offence of giving it committed by the accused, the giver. Only then would the receiver be regarded as *particeps criminis.* This means that just as the giver as a principal offender requires *mens rea,* so does an accomplice witness who received the gratification. If he received the gratification innocently or without any corrupt motive or if he did not receive it at all, although it was given to him, as far as he is concerned the gift did not change its character to become an illegal gratification just because the giver (the accused) gave it with corrupt motive or with evil intention. Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his *actus reus.* The whole idea is completely contrary to the basic concept of criminal liability.

A cursory examination of decided cases in Malaya and Singapore clearly shows that the question whether a receiver is an accomplice or not depends entirely upon the facts of the particular case. For example in *Tay Choon Nam & 2 Ors.* v. *Rex,*[4] a Singapore case, the facts were that there was no dispute between the prosecution and the defence that the witness concerned who received the bribe and was even entertained to a dinner was an accomplice; the question in that case being whether the trial judge was wrong in accepting such evidence. Anyone reading the report of that case will find that there was more than ample evidence to hold that the witness was an accomplice.

In *Lian Teck Chew* v. *Regina,*[5] another Singapore case, a witness who received the bribe was not held to be an accomplice because the first suggestion about the bribe came from the accused, the giver, and also because the witness was acting on the instructions of his superior officers. In *Goh Leng Sai* v. *Regina,*[6] also a Singapore case, a witness to whom the bribe was given was never considered to be an accomplice at all, there being no evidence to show even the possibility that he was an accomplice. The ground of appeal in that case to the effect that the trial judge did not consider the probability that the witness was an accomplice therefore failed.

Goh Leng Sai's case clearly shows that there can be no *prima facie* inference that a witness is an accomplice just because a bribe is given to him. If such is the rule, the law would encourage corruption rather than prevent it. If a receiver is to be held *prima facie* an accomplice, surely it would be better for him to keep the bribe and remain silent over the whole matter rather than report it to the authorities and be embarrassed in court by being branded as an accomplice. The rule is unjust to the witness as it is not inconsistent with the nature of men in that no man can prevent anybody from giving a bribe or committing any offence for that matter. The receiver cannot stop the giver from giving the bribe, although he can prevent himself from accepting it (using the word "accepting" with its attendant intention). There can be no acceptance without the necessary intention. If the receiver is to be held as accomplice, despite the fact that he rejects it and is averse to corruption the law is as unjustly punishing him as it is absurd. Furthermore, the mere taking of the money does not amount to a taking of a bribe if there is no intention to appropriate it as his property. If he takes it with a view to taking official action or to preventing others from taking it, in no sense can the receiver be guilty of the offence as an accomplice, it being only an *actus reus* without the requisite *mens rea.*

We now come to *Baptist's* case *(supra).* The facts in that case could never constitute the witness who received the bribe an accomplice but only an *agent provocateur.* The $100/- bribe given by the appellant to the witness was for the purpose of renewing fishing licences and it was given in a trap set by the police with the colloboration of the witness. Thus although the bribe was corruptly given, it was, however, not received with the same motive and intention as it was received for the purpose of criminal investigation; it was certainly not received for the purpose of appropriating it as the witness' own property. In fact one could say that it was not received at all as there was no intention of its appropriation.

When Syed Sheh Barakbah J. held that the witness was not an accomplice because in his view it makes no difference whether he is the receiver or the payer, the learned judge must have meant that in so far as the determination of a question whether a witness receiving the bribe is an accomplice or not is concerned the same rule applies to him as it does to a witness giving the bribe; the rule being whether he is a *particeps criminis,* or whether he has the requisite *mens rea.* If he is not or has not, be he a payer or a receiver, he cannot be an accomplice. We thus cannot see anything wrong with such an approach.

Reverting to the facts in the present appeal, it is clear beyond doubt that PW8 never asked for the bribe, nor did he ever intend to appropriate it as his property. He was more concerned with finding a way as to how to get rid of it. He could not be blamed nor branded as an accomplice just because the appellants gave it to him. This is something which he could not help. He could not control the appellants' action. What is paramount is his own conduct and intention. The money was literally forced on him and completely given up by the appellants and he never expected this to happen. What would he do under such circumstances? In our view what he did in reporting the matter to his superior officer immediately as the circumstances permitted clearly shows that he had no *mens rea* or intention to keep it as his own property. He is therefore innocent and under no circumstances would he be regarded as taking the bribe and therefore become an accomplice. The gap of about three hours between the time the bribe was given to him and the first opportunity he had in reporting the matter to his superior officer (PW1) was held by the learned President to be a reasonable explanation. We could find no fault with such finding.

In conclusion we answer the question (1) in the negative and that being the case there is no need for us to deal with question (2).

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Suhaimi Khor Zulkifli & Chang.*